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COMPETITIVE FEDERALISM: FIVE CLARIFYING QUESTIONS

LARRY YACKLE*

Before I looked into the two fine books we are reviewing here,¹ I would have said that arguments from federalism are typically fraudulent, neither more nor less than deliberate attempts to cloud the discussion of real issues. Now that I have read what Sotirios A. Barber and Michael S. Greve have written, I am largely confirmed in my prejudices. But my suspicions about federalism contentions have been shaken a bit – enough to ask some questions of Professor Greve, whose answers might persuade me that there is some good in this federalism business, after all. I doubt it, but I am educable.

I begin by explaining my low opinion of federalism theories. None of this is original with me, of course. I offer it only to establish the burden of persuasion that, in my view, Professor Greve must carry. Next, I sketch what I take to be Greve's argument for a "competitive" federalism. Then I put five questions about his book. I do not mean these questions to be antagonistic, though I confess they may sound that way. The point is to seek clarification – to get at what Greve is getting at.

I.

The suspicion that federalism arguments are duplicitous is familiar enough. When your adversary's case begins to look attractive and your own comparatively weak, you naturally change the subject. We need not rest on the classic example, the South's resistance to racial equality in the name of "states' rights." Current illustrations are not far to seek. Officials in Texas claim an offense to state sovereignty if the Justice Department dares to challenge state redistricting plans,² and, as Professor Barber observes, critics of the Affordable Care Act have adopted the same position.³ Acknowledging that federalism talk can mask independent values is neither *ad hominem* nor cynical. We ought to be skeptical when the objection to a principle or policy is not that it is wrong in substance but that it is recognized or implemented at the wrong stratum of

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¹ SOTIRIOS A. BARBER, *THE FALLACIES OF STATES' RIGHTS* (2013); MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2012).

² Charlie Savage, *U.S. Is Suing in Texas Cases over Voting by Minorities*, N.Y. TIMES, Aug. 23, 2013, at A12.

³ See BARBER, *supra* note 1, at 1.

government. If there is something worthwhile in federalism itself, it has to be detached from other ideas for which it is so often a proxy.

There is another layer to the federalism-as-fraud point. When switching the conversation to “states’ rights” is insufficient, the next tactic is to deploy federalism as code for individual liberty.⁴ For reasons that passeth understanding, some people respond favorably to the states’ rights trope alone. Yet most would not bestir themselves greatly to preserve some sense of what the states do or are entitled to do in spite of a national consensus to the contrary. Comparatively speaking, threats to liberty get the juices flowing. One might think that tying federalism to liberty would be a stretch. Then again, it seems that willing minds in this country will view anything that hobbles government as a good thing inasmuch as, by hypothesis, somebody’s individual freedom is enhanced.⁵

Malcolm M. Feeley and Edward Rubin have famously explained that federalism makes practical sense elsewhere in the world, where this peculiar governmental structure is necessary to maintain a single nation, many of whose citizens find their political identity in religion or language, which, in turn, takes root in particular geographic regions.⁶ When distinct congregate populations so hate each other, and so resist being governed together by the same central authority, the only way forward is spatial subunits with some measure of autonomy.⁷ Federalism is not an affirmatively desirable governmental structure, but a “painful expedient” when a nation can be viable in no other way.⁸

Feeley and Rubin demonstrate that these conditions for federalism do not obtain in this country. True, there was a time when some Americans were willing to fight and die to keep other Americans in chains. But we had a Civil War about that, and, today, notwithstanding its celebrated diversities on so many levels, the United States “is in fact a heavily homogenized culture with

⁴ E.g., Clarence Thomas, Assoc. Justice of the Supreme Court, *Why Federalism Matters*, Remarks at Drake University Law School’s Dwight D. Opperman Lecture (Sept. 24, 1999), in 48 *DRAKE L. REV.* 231, 236 (2000) (contending that the independent sovereignty of the states allows them to protect liberty by restraining the national government); see *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

⁵ Professor Moncrieff has identified a cousin of this phenomenon in the complaint that the Affordable Care Act requires individuals to purchase health insurance. In that instance, critics of the statute have judged that voters will not be moved sufficiently by the federalism-as-liberty connection and must be encouraged to see a threat to liberty in isolation. Abigail R. Moncrieff, *Safeguarding the Safeguards: The ACA Litigation and the Extension of Indirect Protection to Nonfundamental Liberties*, 64 *FLA. L. REV.* 639, 640 (2012).

⁶ MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 68 (2008).

⁷ *Id.*

⁸ *Id.* at 60.

high levels of normative consensus.”⁹ Federalism retains some romantic purchase on our politics – which accounts for the value of injecting federalism arguments into debates over policy. But the virtues commonly associated with geographically defined, partially autonomous subdivisions amount to so many rationalizations; they could more easily be realized through sensible decentralization.¹⁰ The vices that inevitably accompany federalism need hardly be listed. We lack other nations’ reasons for living with them, and so we should not. If, then, this unified nation is rapidly developing a centralized structure (and it is), we should welcome the future as it takes shape around us.

II.

Professor Greve acknowledges the case that Feeley and Rubin offer and responds that the federalism he has in mind works only for a “single” populous.¹¹ Federalism can defuse “identity-based differences” that, unchecked, would have disparate populations killing each other.¹² But Greve insists that “one cannot understand American federalism unless one understands the Founders’ insistence that American federalism is not of that kind.”¹³ He proposes, then, an affirmative account of federalism in this country, an account that makes federalism something other than the necessary evil it is everywhere else.¹⁴

Professor Greve devotes the lion’s share of his book to an attack on American federalism as it has come to be understood and practiced since the New Deal. This extant federalism is about the states as entities. In operation, by Greve’s account, it fosters the development of state “cartels,” which conspire with the national government to gouge the public.¹⁵ Greve argues, instead, that federalism is or should be about individual citizens (and businesses) and what they want, and should get, from a federal structure.¹⁶ The answer, he insists, is competition among the several states for the allegiance (and residence) of people and companies searching for the package of taxes, regulations, and services they find most attractive.¹⁷ According to Greve, this

⁹ *Id.* at 118.

¹⁰ *Id.* at 16.

¹¹ GREVE, *supra* note 1, at 6.

¹² *Id.* at 404 n.11.

¹³ *Id.*

¹⁴ I understand Greve to be concerned with the United States exclusively. Hence his extensive treatment of the U.S. Constitution. Since his argument is largely economic, however, he may think that it has, or would have, more general explanatory power. If so, he neither states nor elaborates that contention in this book. *Cf. id.* at 329-30 (suggesting that federalism in countries such as Argentina and Germany may be impervious to change).

¹⁵ *Id.* at 4.

¹⁶ *Id.*

¹⁷ *Id.* at 6-7. Greve would acknowledge that he is not the first to argue that federalism is primarily about competition among the states. He begins his own discussion with “Tiebout

competitive federalism is revealed not only in modern economic analysis, but also in a host of historical writings about the Constitution, most prominently the *Federalist*.¹⁸

This sketch grossly oversimplifies Professor Greve's argument. At any rate there is much more detail in his massive book. If I can hope to contribute meaningfully to this Symposium, I should leave off any further attempt to summarize and move on to my questions.

III.

A.

My first question is whether competitive federalism puts a structural face on what is at bottom a libertarian idea of acceptable government. I do not charge Professor Greve with hiding an ideological theory behind a federalism façade. He is forthright about his personal views and goes so far as to say that governmental life in the Gilded Age was about as good as it gets.¹⁹ Greve does not propose to revive the Old Court's formalism for its own part.²⁰ He advocates what he thinks is an objectively defensible account of federalism that, for him, happily comports with his own predilections. Still, I do wonder whether the libertarian spirit is not evident in the premises from which he works.

Greve begins with an imaginary original position in which individuals choose the government they want before they know what place they will have in society.²¹ He readily acknowledges that, given a choice, most people would not select federalism in any form.²² Assuming, though, that only federalism is on the menu, the question is what kind of federalism individuals would

competition," and cites numerous entries in the fiscal federalism literature. *Id.* at 7 (citing Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956)).

¹⁸ *Id.* at 45-62.

¹⁹ *Id.* at 5, 125. By contrast, Greve associates the federalism he thinks we actually have (and he condemns) with unsustainable individual entitlements that, in his view, are due for a "fiscal reckoning" with which conventional federalism is unequipped to deal. *Id.* at 382-83.

²⁰ According to Greve, the Justices who controlled the Supreme Court in the late nineteenth century did not mean to foster competition among the states, but nonetheless developed doctrines that promoted competitive federalism just the same. *Id.* at 173-74.

²¹ *Id.* at 23. In this, he leans on the distinction between "precommitments" and "in-period" positions developed by James M. Buchanan and Gordon Tullock. *Id.* (citing JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962)).

²² *Id.* at 45, 50 (acknowledging that Madison and Hamilton would have abolished the states if it had been politically possible). Greve concedes that any governmental structure that did not include the existing states was infeasible. Even if the men who drafted and ratified the Constitution had wanted to jettison the states (and some plainly did), they could not have done so. *Id.* at 5-6.

choose.²³ Greve assumes that everyone would see clearly that safety comes first.²⁴ It follows that all would accede to government a monopoly on physical force.²⁵ Beyond that, everyone would agree that “some desirable goods” cannot be generated privately.²⁶ Accordingly, “preconstitutional individuals” would consent that government should be empowered to “force” some exchanges.²⁷ But only on two conditions – “acceptable decision costs” and “adequate safeguards” against “abuse.”²⁸ Summarizing, Greve asserts, “the constitutional task is to craft rules that will permit Leviathan to command Pareto-efficient exchanges while limiting, so far as possible, forced exchanges beyond that point.”²⁹

In these passages, Greve appears to say that, *ex ante*, individuals would agree only to governmental distributions that are efficient in the classic Pareto sense that no one receives a benefit at the expense of another. This, of course, would entail minimalist government that would have troubled Herbert Spencer. Pareto efficiency may be a useful idea in economic analysis; at least, it supplies a label for a category of activity that economists may want to recognize. But few of us would elide Pareto efficiency with justice. An allocation in which one lucky participant has all the toys and his or her unlucky chum has none is Pareto-efficient. Any further distribution must take from the one and give to the other.³⁰

Relatedly (I think), Professor Greve has it that individuals behind the veil would choose competitive federalism, because it promises to “curb government surplus.”³¹ Others have observed that the idea of state “surplus” is both central to Greve’s thinking and surprisingly elusive.³² At times, Greve uses “surplus” in a noncontroversial way to describe the diversion of tax revenues from proper uses and into the pockets of politicians and their friends.³³ On other occasions, he uses the same “surplus” term to mean exactions from out-of-state interests turned to the benefit of the resident

²³ *Id.* at 19.

²⁴ *Id.* at 37.

²⁵ In the case of a potential attack from the outside, as I understand him, Greve thinks that everyone would agree that the national government should have primary authority and responsibility. *Id.* at 37.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ JOHN RAWLS, A THEORY OF JUSTICE 59-60 (1971).

³¹ GREVE, *supra* note 1, at 44.

³² R. Shep Melnick, Book Review, 11 FORUM 77, 87 (2013) (reviewing GREVE, *supra* note 1); Jack M. Balkin, *The Concept of “Surplus” in The Upside-Down Constitution*, BALKINIZATION (June 17, 2013, 4:31 PM), <http://balkin.blogspot.com/2013/06/the-concept-of-surplus-in-upside-down.html>, archived at <http://perma.cc/D4LA-4NPL>.

³³ GREVE, *supra* note 1, at 13.

population.³⁴ This second form of “surplus” is connected to competitive federalism in that cross-border taxation and regulation undermines the ability of mobile individuals and companies to avoid unfavorable treatment by migrating to more sympathetic jurisdictions.³⁵ Yet it is often difficult to tell whether government impositions fall, or are meant to fall, on outsiders. What appear to be extraterritorial taxes and regulation bleed into the run of governmental actions affecting local interests – actions that do not undercut the ability of individuals and companies to “vote with their feet,”³⁶ but rather establish the basis for choices about where to locate.³⁷ Better said, perhaps, in this age there really is no helpful distinction between out-of-state and in-state activities.

In still other instances, Professor Greve has it that government accumulates “surplus” whenever it taxes or regulates in a way that serves the interests of political favorites.³⁸ This last kind of “surplus” is the stock and trade of ordinary politics.³⁹ To label political deal-making as exacting “surplus” is to condemn virtually anything government does. It is hard to credit lumping so many governmental activities together under the roof of “surplus” – everything from padding official expense accounts to building a public school that educators, parents, and taxpayers enthusiastically support, along with the contractors who lobbied for it and stand to make money on the job.⁴⁰ Greve appears to recognize where his account of “surplus” leads – namely to the denunciation of governmental action of any kind short of supplying police and fire protection and the occasional lighthouse.

Which brings us back to my question. If competitive federalism is a good idea because it largely limits government to Pareto-efficient distributions, and because it eliminates or reduces state “surplus” defined to cover most taxation and regulation, is competitive federalism the main event at all? Could Professor Greve just as easily, more easily, argue that the best state is a nightwatchman state without getting into intergovernmental structure?⁴¹ The response cannot be that competitive federalism is the instrument by which

³⁴ *Id.* at 7.

³⁵ Melnick, *supra* note 32, at 88.

³⁶ GREVE, *supra* note 1, at 7.

³⁷ *Id.* at 89.

³⁸ GREVE, *supra* note 1, at 100-01.

³⁹ Melnick, *supra* note 32, at 89 (discussing the problems of characterizing “surplus” as “naked interest group transfers”); Balkin, *supra* note 32 (characterizing this form of surplus as “constituent surplus”).

⁴⁰ *See* Balkin, *supra* note 32.

⁴¹ When Greve addresses tax policy deeper into the book, he claims that the Constitution contemplates a “minimalist system,” which “holds out the prospect of robust tax competition, both vertically (where states and the federal government compete for the same tax base) and horizontally among states (where factor mobility limits the states’ appropriable surplus).” GREVE, *supra* note 1, at 81.

good government, that is, minimal government, is achieved. We would first have to agree that minimal government is something we ought to organize government for. We do not.

B.

My second question is whether competitive federalism owes much to the document we customarily call the Constitution, its text and its history (as best we can discover it). Professor Greve explains at the outset that the point of his book is to elucidate “the Constitution’s competitive structure and logic.”⁴² Yet he disclaims public-meaning originalism and its “narrowly textual, clause-bound exegesis” as “problematic and incomplete.”⁴³ He contends that the “principles and premises” that make sense of the Constitution “cannot be found *in*” the document, but rather in “antecedent” ideas the Constitution does not establish but presupposes.⁴⁴

I do not understand Greve to be saying the obvious – that neither the term “federalism” nor any explicit articulation of federal structure appears in the text of the 1789 document and that, accordingly, federalism of any ilk can at most be an inference from the text. He makes that point, to be sure.⁴⁵ But he means something far more important – namely, that a particular kind of federalism, the competitive kind, is analytically prior to the text. Greve derives competitive federalism independently as the form of federalism that “preconstitutional” individuals would choose for themselves.⁴⁶

Then again, Professor Greve contends that the “calculus” of the Constitution “conforms elegantly” to the competitive federalism model.⁴⁷ This, as I understand it, is a move familiar in legal academic circles. Greve does not propose to milk an idea *from* the text. He identifies an “economic federalism theory” and “brings [it] to bear *on* the text.”⁴⁸ He purports to arrive at the correct account of the text by introducing independent ideas that make sense of it. I hasten to clarify that Greve eschews any Dworkinian attempt to make of the Constitution the best it can be.⁴⁹ Rather, he presents competition as an essential “constitutional principle and ‘tacit postulate’” that gets the Constitution right,⁵⁰

⁴² *Id.* at 5.

⁴³ *Id.* at 14.

⁴⁴ *Id.* at 2, 14.

⁴⁵ *Id.* at 15.

⁴⁶ *Id.* at 19.

⁴⁷ *Id.* at 44.

⁴⁸ *Id.* at 63 (emphasis added).

⁴⁹ *Id.*

⁵⁰ *Id.*

that is, an idea that genuinely explains the Constitution's "architecture"⁵¹ and "logic."⁵²

I have no objection to losing the notoriously flawed notion that constitutional reasoning is an exercise in grammar. The Supreme Court itself drops that pretense in many of its most important and controversial decisions.⁵³ Nor do I protest references to external values as part of a pragmatic effort to make peace with the text, which may be all that Greve proposes to do.⁵⁴ Again, most of us do the same thing all the time. Whether Greve is right that competitive federalism can fill this bill is, of course, something else again. The form his argument takes is noncontroversial; its strength is a matter of judgment for the rest of us.

Professor Greve also, and again explicitly, disclaims any purpose to recover the intentions of the men who drew up the documentary Constitution and ratified it into law. He acknowledges that competitive federalism was "never explicitly articulated by the Founders," and, indeed, states flatly that his book introduces "insights and empirical experiences that were not within the Founders' specific contemplation."⁵⁵ He cautions against "[projecting] modern-day economic and public choice theories . . . backwards" to historical individuals who plainly had nothing of the sort in mind.⁵⁶ So far, so good. Intentionalism is no longer respectable even among die-hard originalists – for the many reasons laid out in an extensive literature.⁵⁷

On this front, however, I wonder whether Greve does not stray from a sound beginning as he goes along. In fairly short order, he insists that the "Founders" *did* "perceive[]" the competitive features of federalism, albeit "imperfectly," and he ascribes to them insights going beyond their conscious understanding at the time.⁵⁸ He claims that *Federalist 10* offered an "ingenious theory" consistent with competitive federalism, despite Madison's personal objection to federalism of any kind.⁵⁹ Indeed, he spends a great deal of time and space locating competitive federalism in the *Federalist* generally.⁶⁰ I do not think Greve means that "the Founders" stumbled over competitive federalism in the

⁵¹ *Id.* at 58.

⁵² *Id.*

⁵³ Greve cites the cases on state sovereign immunity as clear examples. *Id.* at 312-13. But all the decisions having to do with constitutional structure, that is, the decisions in which Greve is most interested, rest at most on values the Court ascribes to the Constitution without specific textual warrant.

⁵⁴ *Id.* at 390.

⁵⁵ *Id.* at 16, 56, 63.

⁵⁶ *Id.* at 7.

⁵⁷ SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 81 (2007).

⁵⁸ GREVE, *supra* note 1, at 17.

⁵⁹ *Id.* at 39.

⁶⁰ *E.g., id.* at 47-49.

dark and made it the foundation of the Constitution by accident.⁶¹ Even as he insists they were not thinking about this kind of federalism, he wants still to credit them with some undeveloped insight that they were adopting a constitutional structure that depends deeply on competition among member states.

Throughout the book, as Greve strives to bring competitive federalism to bear on the Constitution, he rests on what he thinks “the Founders” were about. So, for example, when he distinguishes divided societies in which federalism is an acceptable expedient, he relies on “*the Founders’ insistence*” that American federalism, properly understood, is different – meaning the good kind of federalism he calls competitive.⁶² And in his critique of developments since the New Deal, he argues that the federalism we in fact observe is a federalism “we were never *meant* to have.”⁶³ These statements are jarring next to Greve’s admission that the men he calls “the Founders” lacked a firm commitment to federalism of any stripe.⁶⁴

Perhaps I am making too much of the occasional turn of phrase. Given Greve’s explicit disclaimers, it is hard to think that he does, after all, propose to retrieve and rest on original intentions.⁶⁵ It is vitally important, though, to get this straight. We need to know if Greve contends that we are bound to embrace competitive federalism whether we like it or not, because “the Founders” thought it was a good idea and only their intentions count.

I rather think that Professor Greve means only to fortify his own argument for competitive federalism by associating it with rough ideas held by strong-minded men a long time ago. He links his argument to the historical Constitution and its “Founders” only in the weak sense that competitive federalism, independently arrived at, can be reconciled with at least some of what was written and perhaps thought in 1789.⁶⁶ This, again, is common fare in legal academics, and I would be the last person to say the form of this argument is objectionable. Then again, if this is the way Greve ties competitive federalism to the documentary Constitution and its history, we are back to the previous point. If Greve contends that we should now impose competitive

⁶¹ But see Ilya Somin, *Turning Federalism Right-Side up*, 82 CONST. COMMENT. 303, 321 (2012) (reviewing GREVE, *supra* note 1) (suggesting that “the Founders were organizing a regime of competitive federalism without knowing it”).

⁶² GREVE, *supra* note 1, at 404 n.11 (emphasis added).

⁶³ *Id.* at 5 (emphasis added).

⁶⁴ *Id.* at 56. The Supreme Court notoriously tries to have intentionalist originalism both ways. In *Alden v. Maine*, 527 U.S. 706 (1999), for example, the Court conceded that there is no evidence that anyone in Philadelphia or at the ratifying conventions proposed that the Constitution would immunize states from suit in their own courts, but still insisted that the expectation that the Constitution would accord states immunity can be inferred from silence. *Id.* at 741.

⁶⁵ GREVE, *supra* note 1, at 14.

⁶⁶ See *supra* note 18 and accompanying text.

federalism on the Constitution, he needs a convincing case that we should think this is a good idea in the here and now. And if his reason is that competitive federalism generates Social Darwinism, he will not have many adherents.

C.

My third question is whether competitive federalism comports with democracy. On one level, of course, it plainly does not, cannot, and need not. Anything that exists by virtue of a judicially enforced Constitution is, to that extent, antidemocratic in the obvious sense that a higher law that trumps majoritarian choices necessarily must be. Professor Greve, however, seems affirmatively to celebrate overrides of democratic choices. One might say, indeed, that democracy is the villain of his piece.

In the abstract, Greve allows that democracy is the “safest form of government.”⁶⁷ I take this to mean not that democracy is genuinely good, but rather (with Churchill) that democracy is actually bad, only better than the alternatives. In the next breath, Greve decries democratic government as “dangerous” inasmuch as it enables “rapacious majorit[ies].”⁶⁸ The “constant challenge” to the competitive federalism he champions is “populist passion,”⁶⁹ which, in his view, entails “interest group politics.”⁷⁰

The federalism we actually have, in Greve’s view to our misfortune, has come in response to “democratic demands.”⁷¹ This “cartel” federalism emerged with the New Deal, which itself was the product of an “unusually high political consensus” during the Great Depression.⁷² Back then, according to Greve, the idea was to achieve a “more ‘democratic’ Constitution.”⁷³ The federalism that followed was “more open to the demands of distributional coalitions and progressive social movements.”⁷⁴ The result, in Greve’s telling, has been “opportunistic interest group bargains”⁷⁵ congealing in social policies having a “very social-democratic feel.”⁷⁶

Greve thinks that, “ideally,” the rules for our structural arrangements should be “self-enforcing.”⁷⁷ But competitive federalism is not a machine that would

⁶⁷ GREVE, *supra* note 1, at 38.

⁶⁸ *Id.*

⁶⁹ *Id.* at 42.

⁷⁰ *Id.* at 37.

⁷¹ *Id.* at 178.

⁷² *Id.* at 9.

⁷³ *Id.* at 181.

⁷⁴ *Id.* at 329.

⁷⁵ *Id.* at 327.

⁷⁶ *Id.* at 36. According to Greve, it is unrealistic to think we might retrieve a “pre-New Deal Constitution” despite “democratic imperatives.” *Id.* at 386.

⁷⁷ *Id.* at 27 (internal quotation marks omitted).

go of itself. Given their head, Congress and the states will not preserve state competition, but will, instead, cooperate with each other, thus to produce “surplus.”⁷⁸ Greve explains, then, that “[i]f competitive federalism is your cup of tea, . . . you’ll want to entrust the federal structure principally to the courts”⁷⁹ – specifically “a federal judiciary armed to the teeth with procompetitive federalism provisions”⁸⁰ like the Privileges and Immunities Clause and the Joinder Clause.⁸¹ It is in the enforcement of those provisions, along with similar safeguards for competition fashioned judicially (like dormant Commerce Clause jurisprudence) that the Supreme Court fulfills its essential function to prevent the agents of government from discarding the constitutionally ordained competitive structure.⁸² This, Greve contends, “is our Founders’ constitutional arrangement.”⁸³

In the event, Professor Greve argues that the Court has contrived to get its role backward. Ever since *Carolene Products*,⁸⁴ the Court has chosen to protect individual constitutional rights and statutory “entitlements” created by Congress and the states in response to democratic urges.⁸⁵ His illustrations are *Roe v. Wade*⁸⁶ and various federal social welfare and education programs, including Aid to Families with Dependent Children, Medicare, and Medicaid.⁸⁷ So far from a “rights” Court, however, Greve contends that the Constitution demands a “structure” Court – one that enforces competition *among* the states and leaves individual rights to “competitive politics” *within* the states.⁸⁸

This is startling stuff. One would have thought – certainly I would have thought – that the *Carolene Products* model is precisely right. Decisions made by electorally accountable bodies are presumptively valid, and any judicial trump must be justified by the necessity of protecting the democratic process or individual rights from self-satisfied temporary majorities. Structural matters can and should be left to develop as they will. Indeed, we should expect

⁷⁸ *Id.* at 7.

⁷⁹ *Id.* at 11.

⁸⁰ *Id.* at 78-79.

⁸¹ *Id.* at 69; see U.S. CONST. art. IV, § 2, cl. 1; *id.* art. IV, § 3, cl. 1.

⁸² GREVE, *supra* note 1, at 197; see *id.* at 111, 202 (acknowledging that the dormant Commerce Clause lacks textual foundation). Greve contends that *Swift v. Tyson*, 41 U.S. (1 Pet.) 1 (1842), permitted corporations to use general law to thwart the accumulation of surplus. GREVE, *supra* note 1, at 222. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), favors the plaintiff’s choice of state law and in that way prevents corporations from escaping exploitation by repairing to the federal courts and more favorable general law. GREVE, *supra* note 1, at 222.

⁸³ GREVE, *supra* note 1, at 11.

⁸⁴ *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

⁸⁵ GREVE, *supra* note 1, at 267.

⁸⁶ *Roe v. Wade*, 410 U.S. 113 (1973).

⁸⁷ GREVE, *supra* note 1, at 267, 274-75 (discussing *Roe v. Wade* and federal programs).

⁸⁸ *Id.* at 267-71.

change in those quarters as the political world itself matures. One has to be skeptical, then, about a structural idea that can be perpetuated only by main force exerted by life-tenured judges.

Again, we are back to basics. Professor Greve promotes competitive federalism as “the Founders’ constitutional arrangement,”⁸⁹ albeit he denies that “the Founders” actually thought things out in this way.⁹⁰ If he contends that, even so, competitive federalism is a constitutional mandate imposed upon us by the men who wrote and ratified the 1789 document, then his case for judicial enforcement in the teeth of democratic sentiment is intelligible.⁹¹ Intelligible, but scarcely persuasive. Most of us reject intentionalist originalism out of hand. And if we bought into it at all, we would doubt the case for originalist competitive federalism.

If, on the other hand, Greve does not propose that we are bound to embrace competitive federalism on originalist grounds, then his argument for judicial enforcement must rest on the premise that competition makes sense of the Constitution, whatever the men responsible for it thought they were doing. That claim, however, can be convincing only if we agree that there is great value in competition among the states. Professor Greve thinks there is great value in competition, but that may be only because he likes the results he thinks enforcing competition will produce – namely, minimalist government at all levels.⁹² I do wonder, again, whether this book is not in the end a lengthy apologia for libertarian philosophy. If so, include me out.

D.

My next question is the extent to which competitive federalism recognizes and perhaps promotes personal choices along noneconomic lines. As I read his book, Professor Greve primarily argues that the mobility of capital and labor encourages states to compete with one another for value-generating commercial enterprise.⁹³ Put the other way, companies are, or at least should be, free to shift from jurisdiction to jurisdiction looking for the most advantageous tax and regulatory environment for their businesses. Yet Greve does not limit the reasons for relocating to the desire to make a buck, and I do not understand him to be indifferent to individuals (and groups of individuals) moving about in search of something else, something more personal. He says, for example, that competitive federalism would “give states greater latitude in regulating their own citizens’ mores.”⁹⁴

⁸⁹ *Id.* at 11.

⁹⁰ *Id.* at 16.

⁹¹ *Id.* at 78.

⁹² *Id.* at 5.

⁹³ *Id.* at 6.

⁹⁴ *Id.* at 309.

In a previous book, Greve was explicit that “the advantages of citizen choice extend not only to economic matters but also, and with equal force, to social or lifestyle issues.”⁹⁵ He explained:

Some people do not wish to live near homosexual enclaves or in jurisdictions that permit same-sex marriages; others like a tolerant, bohemian environment. Some people (including some smokers) feel good about themselves when banning smoking in public places; to others (including some nonsmokers), such restrictions smack of creeping fascism. Federalism permits the various constituencies to sort themselves and go their separate ways.⁹⁶

It may be that similar language appears in this new (big) book, and I have overlooked it. Or perhaps this book merely emphasizes economic incentives. At all events, I do wonder whether Greve is still committed to the idea that the Constitution contemplates individual choices about where to live writ large.⁹⁷ I think so.

The idea that the states are to compete on noneconomic grounds is helpful to Greve in one sense. It blunts the charge that competition for commercial businesses systematically benefits states that tax and regulate least. Greve thinks concerns about a “race to the bottom” are overdrawn.⁹⁸ However that may be in the case of competition for economic activity, one might say that introducing competition for individuals making decisions on other grounds renders Greve’s case easier. Corporations focused on their profit margin may not care about personal and social affairs, but individuals do. And some at least are mobile enough to act accordingly.

Competition for individuals pursuing ideologically comfortable surroundings also responds to the suspicion that competitive federalism is another name for minimalist government. According to Professor Greve, the states should largely be allowed to regulate their own citizens as they please. But, of course, citizens who object are free to depart, taking their productivity with them.⁹⁹ The market for citizens disciplines the states, discouraging liberty-crushing regulation that drives too many residents to the exits, but also, and this is the point, encouraging regulation that brings enough new shoppers

⁹⁵ MICHAEL S. GREVE, *REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN* 4 (1999).

⁹⁶ *Id.*

⁹⁷ I should distinguish the familiar understanding that an individual’s entitlement to change his or her state residency is not only grounded in the Fourteenth Amendment, but readily inferable from the Constitution’s structure in the elementary sense that we have but one nation. *See Saenz v. Roe*, 526 U.S. 489, 502-03 (1999); CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

⁹⁸ GREVE, *supra* note 1, at 186-88.

⁹⁹ *Id.* at 7.

in the door.¹⁰⁰ Individual choice is a sorting mechanism, and everything comes out in the wash.

If I understand correctly, Greve does not propose or predict that even perfect state competition for individuals pursuing ideological ends would resolve itself in some middle ground. It is not as though the states would all gravitate toward the same mix of social policies, which, in turn, attracts the maximum number of residents. This is the way political campaigns often work, but it is not what Greve has in mind. Just as Greve disputes the “race to the bottom” thesis with respect to competition for corporations, he would (I think) equally resist the notion that competition for individuals will drive state regulation of personal affairs to the lowest common denominator. Instead, he contends that competition of this kind would produce and preserve a menu of opportunities from which individuals can choose.¹⁰¹

State competition for residents making selections according to criteria like these is unrealistic. The argument is too abstract. In my view, we have too many states. We would need many, many more to make competition on this scale feasible. And individuals would have to be far more mobile than they actually are and, into the bargain, would have to be willing to participate in a massive and never-ending game of musical chairs, always searching for a seat that promises a marginally better approximation of personal ideals.

If we credit that some people would actually behave as Greve anticipates, the implications are not pretty. Individuals end up locating where they anticipate they themselves will not be pushed around, but where other people will be. In Professor Greve’s earlier book, he suggested that state competition benefits what Grover Norquist calls the “Leave-Us-Alone coalition,” which Greve describes as “a conglomeration of . . . gun owners, school choice and home schooling groups, the term limits movement, property rights groups, religious advocacy and lay organizations, tax limitation groups, small business owners, and so on.”¹⁰² Greve explains that these individuals and groups, organized around ideas, are not uniformly libertarian.¹⁰³ Many are not demanding to be let alone at all; they are demanding that government impose burdens on others. So, for example, individuals and groups may want government to impose sectarian doctrine on the state’s population in the form of limits on abortion or same-sex marriage, or they may want government to tax the public to finance their parochial schools. I understand Greve to contend that the states should be free to compete for residents on bases such as these. To that extent, his competitive federalism is not libertarian philosophy by another name. Far, very far, from it.

Professor Greve is clear that state competition of this kind is a two-way street. If I were making my own selection – bear with me a moment – I would

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 6.

¹⁰² GREVE, *supra* note 95, at 23.

¹⁰³ *Id.*

live where women can choose whether to bear children and where people can marry anyone they love. While I am at it, I would find a place where SUVs, smartphones, and leaf blowers are banned; where the wine shops are forbidden to stock anything but cheap Australian reds; and where all watercraft must be made of wood. Oh, and where no one would be allowed to possess a handgun, but everyone would be obligated to have a King Charles spaniel.

Greve would leave individual constitutional rights to the states without any meaningful, reassuring discipline. We conventionally do let states fashion a wide variety of policies, subject only to the check that democracy provides. But we do not, and should not, let states have their way with more personal liberties the Constitution now protects. I have to live with noisy leaf blowers, unless and until I can muster political support for a ban. But where choices about child bearing and marriage are denied, individuals cannot simply be told that's the way we do things around here and, if you do not like it, take a hike.

If I have him right, Greve relies on politics in precisely the wrong place – that is, where personal individual liberty requires protection *from* the majority. With respect to ordinary economic and social welfare matters, however, he discourages political participation and, instead, applauds poor sports who shirk the responsibilities of self-government and simply pick up their marbles and decamp. In his America, individuals exist in self-imposed bailiwicks of bigotry, surrounded by companions who may as well be clones, isolated from anyone who thinks differently. Greve's America has no center at all, far less a center that can hold. It is a nation of detached units. And it has no heart.

E.

My last question is whether competitive federalism supplies any answers to the dysfunctions in the national government with which this Symposium is concerned. Professor Greve contends for a brand of federalism that he thinks benefits individuals and companies. He resists the federalism we actually have in major part for centering on the states as entities. I wonder, though, whether Greve's focus on the horizontal relations among the states does not neglect the role the states play as units in the makeup and operations of the national government. If, for purposes of argument, we accepted that competitive federalism promises the good results Greve identifies, might we still conclude that those benefits are outweighed by the damage federalism does elsewhere in the system?

Take the easiest example. As matters are now arranged constitutionally, each state has two seats in the United States Senate. Consequently, sparsely populated states to the west and south of here exert disproportionate political power. Or, if you like, the resident majorities in those states have a greater capacity to affect the Senate's behavior than do majorities in eastern states with large urban populations. At times, including this time, this undemocratic structural design makes it difficult for the Senate as a whole to perform even routine functions (like giving advice and consent regarding appointments).

I dare say that some proponents of federalism do not view this state of affairs with alarm: The states are supposed to check the national government (thus to safeguard individual liberty), and this is only a graphic illustration of the ways they do so. But I do not understand Professor Greve to take that position. By his account, “the Founders” did not conceive that the states could or would defend liberty against national governmental power¹⁰⁴ and so withheld from the states any means of resisting “federal aggression.”¹⁰⁵ If I am right about this, then, for Greve, the outsized power of small-population western and southern states in the Senate should be an invitation to demand abusive rents – the very thing competitive federalism was meant to forestall. I do wonder, accordingly, whether Professor Greve would form common cause with commentators who fault current arrangements for the states’ participation in the national government.

¹⁰⁴ GREVE, *supra* note 1, at 52.

¹⁰⁵ *Id.* at 54.